Delfi v. Estonia: Privacy Protection and Chilling Effect

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On 16 June 2015, the Grand Chamber of the European Court of Human Rights handed down judgement in the case of *Delfi AS v. Estonia* ([2015] ECHR 586) the case having been referred to it, following the decision of the first section Chamber of the ECHR in October 2013 ([2014] ECHR 941).

Factual Background

It will be remembered that this case involved the decision of the Estonian Supreme Court upholding the imposition of liability on the applicant company for certain anonymous comments which had, temporarily, been published on its news portal. The comments were made in response to a "public interest" story which had been published by the applicants (in respect of the destruction of ice roads) and were inflammatory, and occasionally threatening and, on one occasion, vaguely anti-semitic. They had not been caught by the technology which the applicants had in place which would detect and filter out certain abusive comments nor were they taken down immediately they were published; rather they remained on the applicant's news portal until the human subject targeted by the comments made a complaint – albeit that they were removed on the same day that the complaint was made. Finally, the amount of damages awarded by the Estonian Supreme Court (€320) was notably small, albeit that the argument made by the applicants was, of course, that the bigger impact of the Estonian Supreme Court's decision was the extent to which it would operate to chill their activities as an entity which allowed contemporaneous uploading of comments by anonymous posters.

The Chamber of the ECHR had found that there had been no violation of Article 10 (freedom of expression) of the Convention, reasoning (a) that no priority was to be made as between Article 10 and Article 8 (right to privacy) (b) that there was no reality to the injured party's right to privacy being vindicated by allowing him to take a civil action against the anonymous posters and (c) that the impact of the decision of the Estonian Supreme Court could be measured by the meagre sum of damages that it had awarded, and thus that it was a proportionate response to the need to protect the rights and reputation of that party.

The decision of the Grand Chamber upheld that of the First Chamber in finding that no violation of Article 10 had occurred. The essence the ECHR decision may be summarised as stating that *where a web portal operator operates as an active intermediary of the comments of others and does so for gain, then it is not a violation of its rights to require it to remove such comments from its website on having constructive knowledge that they are either unacceptable (constituting hate speech or incitement to violence) or that they undermine the rights and reputations of others*. Equally there are important differences of approach as between the two which are outlined below. Perhaps the three most important themes which emerge from the decision (certainly in so far as the future of this kind of publishing is concerned) are

- First, the micro point that the *type* of speech that was at issue will be of as much significance as will the rights that are being violated by its publication
- Secondly the broader point that an entity like the applicant cannot claim not to be a publisher (with responsibility) of comments posted anonymously on its web portal and over which it retains some measure of control and that, going forward, there is no violation of the right to freedom of expression where such an active intermediary is required to remove offending comments upon having constructive knowledge of their existence.
- Finally, the yet broader points that normal rules in relation to the balance between freedom of expression and the right to privacy or reputation may need to be significantly amended (certainly in their application) where internet publication is concerned.

The Nature of the Speech

It had been conceded by the applicants that the decision of the Supreme Court did serve a legitimate purpose

namely the protection of the rights and reputations of others. Furthermore, the ECHR did speak of the right to privacy (of which reputation may be a component) and had highlighted the fact that there was to be no automatic prioritisation as between Articles 8 and 10 (para 139). Equally it may possibly be suggested that, whereas the first chamber had made a great deal of this fact and had focused entirely on the potential rights violation that had occurred, the Grand Chamber was far more concerned with the moral quality of the speech in question. What was at issue, in its view, was hate speech, or speech which threatened violence, or indeed, speech which might be characterised as anti-semitic (see for example para 117 and 159). It was for this reason that the Court noted that speech which is incompatible with the values of the convention is not protected by Article 10 as a result of Article 17 (Para 136). It is not quite clear (given the extent to which the Grand Chamber focused on this fact), whether the same decision would necessarily have been reached, had the comments in question impugned the reputation of the injured party whether in a manner which affected his Article 8 rights or not, but where there was no question of either hate speech or threatening speech .

The Applicants as Publishers

The applicants had consistently argued that they should not be regarded as publishers of the material; rather, so they alleged, insofar as the comments posted anonymously in relation to stories was concerned, they were mere intermediaries of the publication by other parties. As a result, so it was contended, the proper defendants in any domestic action should be the anonymous posters, whereas they (the applicants) should benefit from the immunity conferred under EU law by the Electronic Commerce Directive (Directive 2000/31/EC). The Chamber of the ECHR in its judgement had rather glossed over this issue. Instead it had been swayed by the fact that, in its view, the privacy rights of the injured party would not be sufficiently vindicated by requiring him to attempt to determine the identity of the anonymous posters and litigate against them individually. On this basis it devoted virtually no time to assessing whether the applicants were ‘publishers’ in the normal sense but instead was content that liability would be imposed on them for the publication of the comments in any event.

The Grand Chamber also accepted that there was no reality to expecting the injured party to sue the posters in question (para 147). It concluded that it was fully legitimate for the Estonian Supreme Court to characterise the applicants as ‘active intermediaries’, and to impose liability on them on this basis. This was largely because of the level of control which the applicants were capable of exercising over the comments (and having regard to relevant ECJ case law (see Paras 52-57 and 146)), and the fact that, following their submission of comments to the applicants, the authors thereof lost control of them. Importantly the Grand Chamber did not itself make a judgement on whether the applicants were ‘publishers’ but simply found that there was no fault in the fact that the Estonian Supreme Court had reached such a conclusion. And having reached such a conclusion, it further held that it was fully legitimate for the Estonian Supreme Court to approach the matter under domestic obligations law rather than under Directive 2000/31/EC (for criticism see Para 27 of the dissenting opinion of Judges Sajó and Tsotsoria).

This conclusion that the applicants *were* publishers was important for two reasons; first it would inevitably play into the question of whether the decision of the Estonian Supreme Court was a disproportionate response to a pressing social need. Secondly, however, it was important in that the applicants had argued that, as passive intermediaries, the application of domestic obligations law to them was insufficiently foreseeable to be ‘prescribed by law’ for the purposes of Article 10(2) ECHR. Having concluded that they were *not* passive intermediaries but rather, were publishers, the ECHR held that the application of domestic law to them was entirely foreseeable (para 129).

A further question arose as to the precise nature of what was being required of the applicants on foot of the decision of the Estonian Supreme Court (and again this would inevitably impact on the question of whether that decision represented a legitimate interference with their right to free speech). In particular, it was uncertain as to whether the Supreme Court had imposed liability for failing to prevent the posting of the comments in the first place (that is, the inadequacy of the filter system) or for failure to remove them when the applicants first had constructive knowledge of their existence.

The ECHR (para 153) interpreted the decision of the Supreme Court as only requiring the latter (and the joint concurring opinion of Judges Raimondi, Karakaş, De Gaetano and Kjølbro was emphatic that had the Estonian

Supreme Court required the former then "…the outcome of the case might have been different" (para 5). Equally, in their dissenting opinion Judges Sajó and Tsotsoria (para 34) strongly argued that, in fact, the Estonian Supreme Court had intended to impose liability for failure to prevent publication of the comments. In any event, the logic of the ECHR decision is thus, that a domestic law which requires an 'active intermediary' to remove certain kinds of postings (those involving hate speech or racism or threats of violence) without delay on receiving constructive knowledge of their existence is not in violation of Article 10.

Three final points should briefly be made. First, the ECHR made it clear that its decision only related to such 'active intermediaries' who received money for what they were doing (For a criticism of the significance attributed by the ECHR to the economic interests of the applicants see the dissenting opinion of Judges Sajó and Tsotsoria at Para 28). In particular, it would not cover activities of, for example, internet discussion forums or bulletin boards (para 116). Secondly, the ECHR noted the Estonian Government's reference to what it saw as a global trend *against* newspaper portals and the like allowing for the uploading of anonymous comments (para 90). In his concurring opinion, indeed, Judge Zupančič stated his view that it was 'completely unacceptable' that posting of such anonymous comments should be permitted. Thirdly, the argument that the impact of the decision of the Supreme Court would significantly chill the applicants' activities was not borne out by the facts. Rather the ECHR noted that its operation had continued to grow and to thrive (Para 83 and 161).

The Significance of Internet Publication

Finally, the Court (like the first chamber) attached great significance to the fact that what had happened involved publication on the internet which 'provides an unprecedented platform for the exercise of freedom of expression' (para 110). It regularly noted, alongside the benefits provided by the internet, that the capacity for instantaneous and global publication had the potential significantly to undermine the rights of privacy and reputation of persons and it implied, strongly, that its judgement simply would not have application where, for example, the print media was concerned. Put simply, the duties and responsibilities attaching to publishers in this context would be unique (para 113). In other words, the decision of the Estonian Supreme Court that the applicants were required to exercise a greater level of control over anonymously posted comments than had heretofore been the case was not a disproportionate interference with their rights under Article 10 having regard to the potential for harm to the rights ad reputations of others flowing from such publications.

There was, of course, a counter argument to this. The ECHR noted (para 48), but ignored the comment at para 27 of the UNHRC Special Rapporteur *inter alia* on freedom of expression of May 2011 (A/HRC/17/127) that the internet also provided defamed parties with an instantaneous and global right of reply which must play into the question of whether a sanctions imposed on the 'defamer' were necessary or proportionate (see also Para 49 of the ECHR judgement). Thus, it would seem that the decision of the ECHR in this case simply continues a trend evident in other judgements whereby it appears to be viewed as necessary to increase the protections afforded to rights of reputation and privacy generally (and possibly to increase the controls available for grossly unacceptably speech) as a bulwark against the enhanced possibilities for the exercise of freedom of expression de facto provided by the internet.

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